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PTO/SB/21 (02-04) (AW 02/2004)

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FORM**

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Total Number of Pages in This Submission 37

| | |
|----------------------|-----------------|
| Application Number | 09/827,686 |
| Filing Date | April 6, 2001 |
| First Named Inventor | Rizzotto et al. |
| Art Unit | 1731 |
| Examiner Name | Dionne A. Walls |
| Attorney Docket No. | PAR-100US |

ENCLOSURES (Check all that apply)

- ☐ Fee Transmittal Form
☐ Fee Attached
- ☐ Amendment/Reply
☐ After Final
☐ Affidavits/Declaration(s)

- ☐ Extension of Time Request
- ☐ Express Abandonment Request
- ☐ Information Disclosure Statement
- ☐ Certified Copy of Priority Document(s)
- ☐ Response to Missing Parts/
Incomplete Application
- ☐ Response to Missing Parts under
37 CFR 1.52 or 1.53

- ☐ Drawing(s)
- ☐ Licensing-related Papers
- ☐ Petition
- ☐ Petition to Convert to a
Provisional Application
- ☐ Power of Attorney, Revocation,
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- ☐ After Allowance Communication
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of Appeals and Interferences
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(Appeal Notice, Brief, Reply
Brief)
- ☐ Proprietary Information
- ☐ Status Letter
- ☒ Other Enclosure(s) (please
identify below): Exhibit A and
Return Post Card

Remarks:**SIGNATURE OF APPLICANT, ATTORNEY OR AGENT**

| | | | |
|-------------------------|------------------|-----------------------------------|--------|
| Firm or Individual Name | James C. Simmons | Registration No. (Attorney/Agent) | 24,842 |
| Signature | | | |
| Date | June 3, 2004 | | |

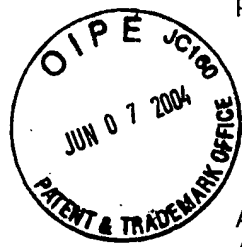
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appln. No: 09/827,686
Applicant: Rizzotto et al.
Filed: April 6, 2001
Title: CHEWABLE FLAVOR DELIVERY SYSTEM
TC/A.U.: 1731
Examiner: Dionne A. Walls
Confirmation No.: 5077
Notice of Appeal Filed: November 12, 2003
Appeal Brief Filed: January 12, 2004
Docket No.: PAR-100US

REPLY BRIEF UNDER 37 C.F.R. § 1.193

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S I R:

Appellants have reviewed the arguments in the Examiner's Answer filed in the response to their Brief on Appeal and believe the arguments presented by the Examiner require a further response.

Furthermore, Appellants have submitted a third amendment under 37 CFR 1.116 seeking to amend claims 1 and 18, the only independent claims in the case to close the scope of the claims so that the claims now read upon only an edible cellulose plant material being 100% cabbage leaves. A copy of the amendment is attached hereto as Exhibit "A".

ARGUMENT

For the reasons advanced in the Brief on Appeal and for the reasons advanced below Appellants respectfully submit that the Final Rejection of the above-identified application was improperly made and should be withdrawn.

A. The Examiner's arguments in regard to Claims 1, 4-8, 18 and 24-25 rejected over Finberg U.S. Patent 3,067,068.

As the Examiner correctly points out Finberg teaches only a product which is a combination of cabbage leaves and papaya leaves, which is clearly different than Appellants composition which is 100% cabbage leaves. Appellants in the amendment accompanying this Reply Brief have amended the independent claims to limit the scope of the claims to an edible cellulosic material containing 100% cabbage leaves. In view of the amendments to the independent claims, the rejection over Finberg can not stand because Finberg neither teaches a composition being 100% cabbage leaves nor does Finberg teach or suggest anything about maintaining a percentage of intact cell walls in the material to achieve the final product.

Finberg does not specify size or size reduction or teach or suggest what methods are used and what the result is, therefore, there can be no interpretation of conditions without using Appellants' own teaching as to how much intact cells walls should be left in the prepared product. The Examiner's rejection is fraud with the improper use of Appellants' teaching to not only select but to interpret the reference, totally contrary to existing Patent Law.

Therefore, it is once more respectfully submitted that the rejection of claims 1, 4-8, 18 and 24-25 under 35 U.S.C. § 102(b) or in the alternative under 35 U.S.C. § 103(a) over Finberg is not well taken and should be reversed.

B. The Examiner's argument in regard to Claims 1, 4-6, 8, 18, 23 and 25 as anticipated by or in the alternative as obvious over Aebi et al. U.S. Patent 5,368,873.

Appellants respectfully submit the Examiner has stretched the Aebi reference beyond all reasonable bounds as to what the Aebi et al. teaching contains within the four corners of the reference.

While it is true Aebi et al. teach slicing vegetables, such as cabbage, Aebi et al. neither teach nor suggest the desirability of a minimum amount of intact cell walls that must be maintained in order to achieve their product which is a dried

cabbage leave that when re-hydrated once again exhibits the properties of the cabbage.

Contrast this with Appellants' invention, which is not at all concerned with maintaining the flavor characteristics of the cabbage but using the cabbage as the host for creating a tobacco substitute or a flavor delivery system. Furthermore, Aebi et al. teach that the entire vegetable product must be infused with an osmotic agent, e.g. 60% sucrose. Therefore, Aebi et al. would not be interested in further processing the product before treating with the osmotic agent and, nowhere do Aebi et al. disclose that the product should have anything less than 100% intact cell walls. It is pure speculation to suggest that there is any measurable quantity of intact cell walls that result from the slicing of the cabbage in the manner taught by Aebi et al. There is no teaching by Aebi et al. of the slicing technique or that there is any destruction of the cell walls, or more importantly there is no teaching or suggestion that if cell walls are destroyed in the slicing operation such destruction may have any effect on a re-hydratable product.

Contrary to the allegation of the Examiner, example 10 of Aebi et al. does not teach grinding the cabbage. The cabbage is used in slices. In point of fact, at column 7, lines 30-32 Aebi et al. state the following:

"Initial preparation of head vegetable such as cabbage will be processed similarly to leafy vegetables however in contrast to the leafy vegetables waste material removal from in washing of the head vegetables would occur prior to slicing/slash cutting separation of non-leaf material from the cabbage head may be done by any acceptable means due to the thickness of the leaf of head vegetable it is imperative that the leaves must be sliced with thickness from one sixteenth to one quarter to facilitate infusion of the vegetable tissue a more preferable range would be from one eighth to three sixteenth inch the slicing 26 can be carried out manually or by the use of such devices as an automatic meat slicer or an Urschel cutter."

The Examiner refers to column 17, line 50, of Aebi et al. to show Aebi et al. grind their cabbage. A fair reading of the entire paragraph encompassing line 50, e.g. column 17, lines 46-54, shows that the cabbage leaves were ground for color measurement, not for use as a final product. Cabbage ground to a fine mesh size would not look like or taste like a cabbage leaf, the product sought by Aebi et al.

In a discussion at column 7, lines 16-29 by Aebi et al. concerning preparation of leafy vegetables, the leafy vegetables are centrifuged to remove surface water and in a particular centrifuge because according to Aebi et al.:

"This method removes greater than 90% of the surface water with minimum damage to the leaves."

From the foregoing it is impossible to see how Aebi et al. teach or suggest Appellants invention without using Appellants' own teaching to not only select but to interpret the reference. There is nothing in the four corners of the Aebi et al. reference that would lead a worker skilled in the art to require that at least 30% of the cell walls must be intact in order to achieve Appellants product. For all intents and purposes there could only be 5 or 10% of the cell walls left intact after the cabbage is sliced and still have an acceptable product.

Again, it can not be too strongly urged that the Examiner has used Appellants teaching to not only select but to interpret the references, clearly contrary to existing Patent Law.

Therefore, it is respectfully submitted that the rejection of claims 1, 4-6, 8, 18, 23 and 25 under 35 U.S.C. § 102(b) or in the alternative under 35 U.S.C. § 103(a) over Aebi et al. U.S. Patent 5,368,873 is not well taken and should be reversed.

C. The Examiner's argument in regard to Claims 4-6 and 22-23 rejected over Finberg in view of Garber.

In view of the arguments set forth above it is respectfully submitted that the Finberg reference is fatally defective. Garber merely teaches that chewing tobacco can be supplied in granular form without specifying particle size ranges so that any deficiencies of Finberg are not filled in by Garber.

Here again, the Examiner is using Appellants own teaching to not only select but to interpret the references.

Appellants can not too strongly urge the fact that they have satisfied a long felt need in developing a chewable flavor delivery system that is made with natural materials as well as having developed an oral tobacco substitute. Were Appellants invention obvious and surely would have been brought forth to the public before their application was filed since the Finberg reference speaks from 1959 and the Garber reference from 1943. Were Appellants invention obvious it surely would have been brought forth long before their discovery.

In view of the foregoing it is respectfully submitted that final rejection of claims 4-6 and 22-23 under 35 U.S.C. § 103(a) over Finberg in view of Garber is not well taken and should be reversed.

D. The Examiner's rejection of Claims 9 and 26 over Aebi et al. in view of Nonomura et al.

For the reasons set forth above Appellants submit the Aebi et al. reference is fatally defective and neither teaches nor suggests their invention. Once again Appellants submit that the deficiencies of the Aebi et al. reference can not be filled in by Nonomura et al. without using Appellants own teaching to interpret the references. Nonomura et al. do not teach freeze dried cabbage classified as Brassica oleracea. Nonomura et al. do not have even a remote relationship to a flavor delivery system or tobacco substitute using cabbage material as specified and claimed by Appellants.

Therefore, it is respectfully submitted that the final rejection of claims 9 and 26 under 35 U.S.C. § 103(a) over Aebi U.S. Patent 5,368,873 in view of Nonomura et al. U.S. Patent 5,597,400 is not well taken and should be reversed.

E. The Examiner's rejection of Claims 1 and 4-8 over Rozacky et al.

Appellants once again submit that Rozacky et al. neither teach nor suggest any specific plant (non-tobacco) or tree leaf material to be used in their process. While Rozacky et al. talk about using dried vegetable leaves to produce a

tobacco substitute their tobacco substitute can be used either as a "smoking tobacco" or a "non-smoking tobacco". If one were to put a match to Appellants product it can no longer be useful as a flavor delivery system and in point of fact would be ruined. Contrary to the allegations by the Examiner, Rozacky et al. do not specifically teach or suggest the cabbage leaves can be used to produce a chewable flavor delivery system or an oral tobacco substitute. The only place this conclusion can come from is Appellants teaching. Here again, the Examiner has used Appellants teaching to not only select but to interpret the reference. Furthermore, Rozacky et al. must have a higher moisture content. Here again, the Examiner is using a indefinite phrase, i.e. "dried to a suitable moisture content" to reject Appellants claims by using Appellants own teaching to interpret the reference. Furthermore, as pointed out to fair degree by the Examiner, Rozacky et al. nowhere teach or suggest the fact that at least 30% intact cell walls must be present in the shredded material to achieve Appellants product. This means that according to the Examiner's logic, the interpretation of the Rozacky et al. reference could mean that the vegetable product is shredded to the point where there are no intact cell walls. One can not take a disclosure that is specific, make it completely elastic and stretched beyond the bounds of reasonable interpretation. Here again, the Examiner has fallen into the trap of using Appellants own teaching to not only select but to interpret the reference which is clearly contrary to existing Patent Law.

In view of the foregoing it is respectfully submitted that the final rejection of claims 1 and 4-8 under 35 U.S.C. § 103(a) over Rozacky et al. U.S. Patent 3,702,615 is not well taken and should be reversed.

F. The Examiner's rejection of Claim 9 over Rozacky et al. in view of Nonomura et al.

For the reasons advanced above it is respectfully submitted that the Rozacky et al. reference is fatally defective in teaching or supporting Appellants invention. Furthermore, while Nonomura et al. disclose planting of cabbage the Nonomura et al. invention relates to enhancing carbon fixation in plants and not to producing a chewable flavor delivery system or an oral tobacco substantive. Once again, the Examiner is using Appellants own teaching to not only select but to interpret the references.

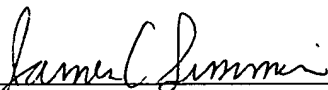
It is respectfully submitted that the rejection of claim 9 under 35 U.S.C. § 103(a) over Rozacky et al. U.S. Patent 3,702,615 in view of Nonomura et al. U.S. Patent 5,597,400 is not well taken and should be reversed.

The Examiner has suggested Appellants' have not shown their results are unexpected. However, since none of the references teach or suggest Appellants' invention the characteristics are unexpected per se. The Examiner has infused the rejections and Reply Brief with suggestions and conjecture based upon use of Appellants' teaching to reach conclusions far beyond what a fair reading of the cited references would teach and which the cited references may suggest or where they would lead a worker skilled in the art.

One can not selectively interpret the prior art without a fair scientific or logical basis for such interpretation.

Therefore, it is respectfully requested that the Honorable Board reverse the Final Rejection of the claims in the above-identified application.

Respectfully submitted,



James C. Simmons, Reg. No. 24,842
Attorney for Applicant

JCS/mc

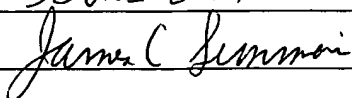
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Appln. No.: 09/827,686
Amendment Dated June 3, 2004

EXHIBIT A

PAR-100US



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appln. No.: 09/827,686
Applicant: Rizzotto et al.
Filed: April 6, 2001
Title: CHEWABLE FLAVOR DELIVERY SYSTEM
TC/A.U.: 1731
Examiner: Dionne A. Walls
Confirmation No.: 5077
Docket No.: PAR-100US

THIRD AMENDMENT UNDER 37 C.F.R. § 1.116

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Sir:

In response to the Final Rejection dated June 12, 2003, please amend the above-identified application as follows.

- ☐ **Amendments to the Specification** begin on page _____ of this paper.
- ☒ **Amendments to the Claims** are reflected in the listing of claims which begins on page 2 of this paper.
- ☐ **Amendments to the Drawings** begin on page _____ of this paper and include an attached replacement sheet(s).
- ☐ **Amendments to the Abstract** are on page _____ of this paper. A clean version of the Abstract is on page _____ of this paper.
- ☒ **Remarks/Arguments** begin on page 5 of this paper.

Amendments to the Claims: This listing of claims will replace all prior versions, and listings, of claims in the application

Listing of Claims:

1. (Currently Amended) A chewable flavor delivery system comprising-consisting of in combination:

a carrier consisting of an edible cellulosic plant material being 100% cabbage leaves prepared by one of, forming into strands or in grannular form dried to a moisture content of at or below 8% by weight, said cabbage leaves having at least 30% intact cell walls;

a water soluble but not water containing flavoring ingredient in liquid form and capable of entering intact cell walls of said cabbage leaves; and

an effective amount of a food safe humectant.

2. (Cancelled)

3. (Cancelled)

4. (Previously Presented) A delivery system according to claim 1, wherein said grannular cabbage leaves are sized to pass a 16 mesh and be retained on a 30 mesh screen of a U.S. Standard Sieve Series of screens.

5. (Previously Presented) A delivery system according to claim 4, wherein said grannular cabbage leaves are sized to pass a 16 mesh screen and be retained on a 20 mesh screen.

6. (Previously Presented) A delivery system according to claim 4, wherein said grannular cabbage leaves are sized to pass a 20 mesh screen and be retained on a 30 mesh screen.

7. (Original) A delivery system according to claim 1, wherein said humectant is selected from the group consisting of propylene glycol and glycerin.

8. (Original) A delivery system according to claim 1, including a minor amount of a sweetening agent.

9. (Previously Presented) A delivery system according to claim 1, wherein said cabbage leaves are freeze dried green cabbage classified as Brassica oleracea capitata.

10. (Cancelled)

11. (Cancelled)

12. (Cancelled)

13. (Cancelled)

14. (Cancelled)

15. (Cancelled)

16. (Cancelled)

17. (Cancelled)

18. (Currently Amended) An oral tobacco substitute ~~comprising~~ consisting of in combination:

an edible cellulose plant material being 100% cabbage leaves chopped or ground into a granular form and sized to pass a 16 mesh screen and be retained on a 30 mesh screen of a U.S. Standard Sieve Series of screens dried to a moisture content at or below 8% by weight, said granular cabbage leaves having at least 30% intact cell walls;

a water soluble but not water containing flavoring ingredient in liquid form and capable of entering intact cell walls of said granular cabbage leaves; and

an effective amount of a food safe humectant.

19. (Cancelled)

20. (Cancelled)

21. (Cancelled)

22. (Previously Presented) A tobacco substitute according to claim 18, wherein said granular cabbage is sized to pass a 16 mesh screen and be retained in a 20 mesh screen.

23. (Previously Presented) A tobacco substitute according to claim 18, wherein said granular cabbage is sized to pass a 20 mesh screen and be retained on a 30 mesh screen.

24. (Original) A tobacco substitute according to claim 18, wherein said humectant is selected from the group consisting of propylene glycol and glycerin.

25. (Original) A tobacco substitute according to claim 18, including a minor amount of a sweetening agent.

26. (Previously Presented) A tobacco substitute according to claim 18, wherein said cabbage leaves are freeze dried green cabbage classified as *Brassica oleracea capitata*.

27. (Cancelled)

28. (Cancelled)

29. (Cancelled)

30. (Cancelled)

31. (Cancelled)

- 32. (Cancelled)
- 33. (Cancelled)
- 34. (Cancelled)
- 35. (Cancelled)

Remarks/Arguments:

Applicants/Appellants have amended claims 1 and 18, the only independent claims in the application.

Claims 1 and 18 were amended to close the claims thus excluding edible cellulosic materials, other than cabbage leaves.

Respectfully submitted,



James C. Simmons, Reg. No. 24,842
Attorney for Applicants

JCS/mc

Dated: January 14, 2004

☒ P.O. Box 980
Valley Forge, PA 19482
(610) 407-0700

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